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No. _____

In The
Supreme Court of the United States
October Term, 1999

WALLACE R. NOEL,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP.,
as receiver for Western Gulf Savings and Loan Association, a
Texas savings and loan association,

Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether when the Tenth Circuit Court of Appeals affirmed the trial court grant of summary judgment, it extended the federal common law doctrine of *D'Oench Duhme*, violating this Court's mandate in *Atherton v. FDIC*, ___ U.S. ___, 117 S.Ct. 666 (1997).

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JURISDICTION

Date of Judgment sought to be reviewed: May 14, 1999

Date of Order denying request for Reconsideration: July 14, 1999

Pursuant to 28 U.S.C. § 1254(1), this Petition seeks review of an order issued by the United States Court of Appeals for the Tenth Circuit.

Jurisdiction was proper in the trial court under 12 U.S.C. § 1819 and 28 U.S.C. § 1331, as an action involving the Resolution Trust Corporation and the Federal Deposit Insurance Corporation.

STATUTES INVOLVED IN THIS CASE

There are no statutes directly involved in the resolution of this case. This Petitionmakes references to 12 U.S.C. § 1823(e). However, that statute was held by the Circuit Court not to be applicable. We agree with that finding.

STATEMENT OF THE CASE

This case is before this Court following a decision of the Tenth Circuit, affirming a trial court summary judgment in favor of the Federal Deposit Insurance Corporation ("FDIC"). The judgment was entered after the district court found that the *D'Oench Duhme* doctrine barred defenses and counterclaims asserted by the Petitioner Wallace R. Noel ("Noel"), in response to litigation filed by the Resolution Trust Corporation ("RTC"), as receiver for Western Gulf Savings and Loan Association ("Western Gulf"), a Texas savings and loan. RTC then was succeeded by FDIC as the plaintiff in the lawsuit.

In May, 1983 Noel entered into a written partnership agreement with Mile High Mortgage and Investment, Inc. ("Mile High"), a Colorado subsidiary of Western Gulf. The partnership was known as University Courts, Ltd. ("University Courts"). The purpose of the partnership was to develop a condominium project in Ft. Collins, Colorado, adjacent to Colorado State University. Noel was the limited partner, and Mile High was the general partner. At the time the partnership agreement was executed, Mile High was owed 51% by Western Gulf Service Corp., a wholly owned subsidiary of Western

Gulf, and 49% by Roy Pogue. Shortly after formation, Western Gulf purchased Pogue's interest, having learned that Pogue was involved in illegal activities in some of his other business dealings.

At the time of its formation, University Courts established a $2.5 million dollar line of credit. The lender named in the promissory note ("Note") was Mile High, the general partner. The Note was signed by Mile High, as general partner, by Noel as limited partner and by Noel, individually. Mile High immediately assigned the Note to Western Gulf, who actually provided the money and serviced the loan.

The Note was a one year construction note, intended to be paid either by permanent financing or by sale of the condo units. However, the project proceeded slower than anticipated. In May of 1984, Western Gulf extended the Note, over the objection of Noel, who had expected his guarantee liability to be extinguished within one year. Six months later, the Note again came due. Once again, the Note was extended over Noel's objection.

The Note came due a third time in May, 1985. By this time, Western Gulf was in serious financial and regulatory trouble. It was operating under a Consent Agreement with the Federal Home Loan

Bank Board. The terms of that Agreement prohibited Western Gulf from simply "rolling over" the Note. As a result, nothing was done. The Note went into default.

In June or July, 1985, Western Gulf decided to apply the accounting procedure known as "in substance" foreclosure to the University Courts Note. Under this procedure, a loan and related collateral are listed on the books of the institution as if a foreclosure already has taken place. Such accounting treatment is proper if the borrowers do not have funds sufficient to pay the loan, and the only source of repayment is the collateral. The treatment was justified here. Western Gulf closed both Mile High, and the subsidiary which owned Mile High. All operations of these two entities were folded into Western Gulf. Thereafter, the University Courts' property was carried on Western Gulf's books as "REO" or "real estate owned" giving the impression that a foreclosure had occurred, even though no legal proceedings had been commenced. All of the rental income generated by the condo units, as well as all of the expenses incurred in the operation were booked as those of Western Gulf.

Also commencing in 1985, Mile High, Noel's general partner, and Western Gulf ceased having any contact with Noel. He was not sent reports on the operations of the project. He was not sent tax returns or annual financial statements, as required by the partnership agreement. Western Gulf considered Noel and the University Courts partnership not to exist.

In December, 1998, Mile High and the University Courts partnership were discussed at a meeting of the board of directors of Western Gulf. The minutes of that meeting indicate that no action had been taken to pursue legal remedies against Noel because of fear that Noel might have claims against the institution. The president of Western Gulf was directed to contact Noel and see if the matter could be closed.

Pursuant to that directive, in February, 1989, Noel was sent a letter requesting that he execute a deed in lieu of foreclosure, in exchange for a release of liability on the note. Unfortunately, for reasons unknown, the letter was not received by Noel. (He would have signed it, had he received it.)

In early to mid, 1989, RTC was appointed conservator for Western Gulf. Then in November, it was appointed receiver. Shortly thereafter, RTC commenced this action against Noel, seeking to collect on his guarantee of the Note. Thus began a long and torturous journey, bringing Mr. Noel to this Court.

Shortly after the case was filed, FDIC moved for summary judgment, asserting that *D'Oench Duhme, v. FDIC*, 315 U.S. 477 (1942), and the statutory codification of that doctrine, found at 12 U.S.C. § 1823(e) barred all of Noel's defenses and counterclaims. Noel resisted, asserting that *D'Oench Duhme* did not apply to the facts of this case, and that even if it did apply, he could comply with the requirements. The trial court, Judge Richard Matsch presiding, found that summary judgment would not be granted, as the transaction was one where "Western S & L made a loan to itself. . . ." Transcript of Proceedings, Hearing - All Pending Motions, June 1, 1992, cited in Defendant's Response In Opposition To Renewed Motion For Summary Judgment, p.3., Appt.App., Vol. I, Tab 7.

Thereafter, Noel moved for summary judgment, asserting that Western Gulf was the alter ego of its subsidiary, Mile High. Noel

argued that since Mile High was liable to indemnify him for his guarantee obligation on the Note, and since Western Gulf was liable for Mile High's obligations (as its alter ego), Western Gulf's claims were circular, and should be dismissed. After his motion first was denied, Noel took additional discovery. A renewed motion was granted. RTC appealed. In an unpublished decision, the Tenth Circuit reversed,[1] sending the matter back to the trial court with the direction that the factual basis for Noel's alter ego defense was to be determined by the trier of fact before the legal consequences thereof were established.

Upon return of the case to the trial court, Judge Matsch recused himself, stating that he thought he was prejudiced against RTC. Judge Babcock was assigned to the case. He allowed RTC to file, for a third time, its summary judgment motion, asserting *D'Oench Duhme*. On June 17, 1996, Judge Babcock granted RTC's motion. Noel filed a series of requests for reconsideration, each time asserting an additional basis for reversing the summary judgment. All requests for reconsideration were summarily denied.

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[1]This decision is Appendix II.

In July, 1997, trial was held on several fraud issues, which had not been resolved by the summary judgment order. RTC asserted that Noel defrauded Western Gulf at the time the Note was signed, because he did not intend to pay the Note. Noel admitted that he did not intend to pay, as his liability was that of a guarantor. Guarantors never intend to pay the obligation they have guaranteed. They intend that the primary obligor or the project itself will pay the note. Noel asserted that this fact was known to agents of Western Gulf. However, the summary judgment cut off Noel's ability to assert the alter ego defense. Undoubtedly, this contributed to the jury's view of the case. Noel was found liable for $1.351 million dollars on the claim of non-disclosure. With the amounts owed under the summary judgment, judgment was entered against Noel for $2.552 million plus interest.

Noel's Motion for post trial relief was denied. He appealed to the Tenth Circuit, asserting two primary grounds for reversal. First, under the Ninth Circuit's decision in *Ledo Financial Corp. v. Summers*, 122 F.3d 825 (9th Cir. 1997), the *D'Oench Duhme* doctrine was inapplicable in situations were FDIC was acting in its capacity as receiver for a failed institution. Second, since his transaction with

Western Gulf was completed long before the FIRREA amendments to 12 U.S.C. § 1823(e), that law could not be retroactively applied.

The Tenth Circuit held that the issue of whether *D'Oench Duhme* could be applied to cases where FDIC was acting merely as a receiver had not been timely raised in the trial court. Therefore, the court refused to consider the issue. The court did agree that 12 U.S.C. § 1823(e) could not be applied to this transaction. However, the court held, in this case, that the *D'Oench Duhme* doctrine acted as a bar as a matter of law, and affirmed the summary judgment. In doing so, the court impermissibly expanded the *D'Oench Duhme* doctrine, contrary to *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994) and *Atherton v. FDIC*, ___ U.S. ___, 117 S.Ct. 666 (1997).

REASONS FOR GRANTING THE WRIT

I.

When the Tenth Circuit Court of Appeals Affirmed the Trial Court's Grant of Summary Judgment, it Extended the Federal Common Law Doctrine of *D'Oench Duhme*, in Contravention of this Court's Mandate in *Atherton*.

In affirming the trial court's grant of summary judgment, the Tenth Circuit refused to consider the question of whether the common law doctrine of *D'Oench Duhme* applied to cases where the FDIC was acting merely as a receiver for a failed savings and loan. The Circuit Court determined that Noel had waived that argument by not timely asserting the issue in the trial court. However, in so doing, the Circuit Court went beyond the well established boundaries of the *D'Oench Duhme* doctrine, impermissibly expanding the federal common law, notwithstanding this Court's prior announcement that expansion required an overriding federal interest, not present in this case.

The *D'Oench Duhme* doctrine is intended to "protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans." *D'Oench, Duhme*, 315 U.S. at 457. According to this Court, the test was not whether the maker of the note intended to deceive banking authorities. Rather, FDIC was allowed to invoke the defense if "the maker lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled." *Id* at 460.

The *D'Oench* doctrine long has been recognized as "a rule of equitable estoppel. . . [which bars] any defense a borrower may assert in which the borrower participated in a scheme which tends to deceive the insurer." Hymanson, *Borrower Beware: D'Oench, Duhme and §Section 1823 Overprotect the Insurer When Banks Fail*, 62 S.Cal.L.Rev. 253, 271-272 (1988). As an equitable defense, the *D'Oench Duhme* doctrine should not be resolved on summary judgment. There simply are too many factual issues implicit in the defense.

As the Tenth Circuit held in *Oklahoma Radio Associates v. FDIC*, 987 F.2d 685 (10th Cir. 1993):

> "We agree with this second argument of ORA that the summary judgment based on *D'Oench* was in error. It is true, as noted by the Fifth Circuit in *FDIC v. McClanahan*, 795 F.2d at 515, that the Supreme Court felt so strongly about the need to promote the *D'Oench* policies that it indicated the estoppel rule would apply even in cases where the maker of an instrument was 'very ignorant and ill-informed of the character of the transaction[,]' *D'Oench*, 315 U.S. at 458-59, 62 S.CT. at 680 (quoting *Rinaldi v. Young*, 92 F.2d 229, 231 (D.C.Cir.1937), and 'may not have intended to deceive any person' and where 'creditors may not have been deceived or specifically injured.' Nevertheless, as noted earlier, *McClanahan* observed that *D'Oench* has not been read to mean there can be no defenses

at all to attempts by the FDIC to collect on promissory notes." *Id.*, 987 F.2d at 693 .

"The original test for determining whether claims were barred under the *D'Oench* doctrine was whether the agreement, oral or written, either was designed to deceive the public authority or would tend to have that effect. Courts, however, have expanded the doctrine, and it now applies in virtually all cases where the FDIC is confronted with an agreement not documented in the institution's records." *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir, 1997). Hence, under the *D'Oench* doctrine, there is a two pronged test: a) Is FDIC confronted with an undocumented agreement; and b) if so, was that agreement part of a scheme to deceive the regulatory authorities.

This Court has not established a bright line test to determine whether a particular agreement was "secret." Nor has the Court decreed that all undocumented agreements necessarily evidence an intent to deceive federal regulators. Indeed, following this Court's directions, the Ninth Circuit, in *Murphy v. FDIC*, 38 F.3d 1490 (9th Cir. 1994) specifically approved of the jury being asked to determine whether the borrower lent himself to a scheme to defraud or was its

victim. *See* 38 F.3d at 1498. Clearly, under *D'Oench*, the applicability of the defense is a jury question.

Uncertainty and the need for a case by case determination as part of the application of this equitable doctrine lead Congress in the early 1950's to enact the first version of 12 U.S.C. § 1823(e)(1). Thus "the statute makes the common law principle both more encompassing and more precise." *FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir. 1987). As stated by the Eleventh Circuit:

> By allowing the FDIC to rely on the records of the bank, the specific recording requirements of § 1823(e) enable the FDIC to determine quickly whether to engage in a purchase and assumption transaction, or whether to liquidate the failed bank and pay off insured deposits.

Motorcity of Jacksonville Ltd. v. Southeast Bank, 83 F.3d 1317, 1324 (11th Cir. 1996).

As these excerpts show, courts have recognized that without the statute, the common law application of *D'Oench Duhme* was a factual issue. The statute was needed to remove the case by case jury analysis.

In its opinion below, the Tenth Circuit specifically held that the statutory provisions of 12 U.S.C. § 1823(e) are not applicable to this

case.[2] Under the previously cited precedent, without the statute, the summary judgment order should have been reversed, as application of *D'Oench Duhme* was for the jury.

The Tenth Circuit refused to reverse. It held that summary judgment was proper under *D'Oench Duhme* alone. In fact, the court made several findings "as a matter of law" removing the clearly equitable doctrine from the trier of fact. In so doing, the court engaged in an impermissible expansion of the *D'Oench Duhme* doctrine, giving it a rigid, formulastic characterization not previously applied by this, or any other court.

The Tenth Circuit held that the FDIC has "no duty to scour a failed institutions's documents for inferences and hidden duties supporting defenses or counterclaims that might prevent the FDIC from collecting the full value of an otherwise facially valid instrument." Appendix.I, p. 34. The court went on to hold that a

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[2]The court said: "Prior to the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") amendments in 1989, § 1823(e) applied only to the FDIC in its corporate capacity. We have previously held that 'the 1989 statute's extension to the FDIC as receiver of section 1823(e)'s provisions . . . does not apply retroactively.' *Oklahoma Radio Assocs. v. FDIC*, 987 F.2d 685, 690 (10th Cir. 1993). Because the conduct of the parties and the agreements at issue here took place prior to 1989, the district court erred in applying § 1823(e) in this case." Appendix I, p. 30-31.

collection of documents to which Noel referred the trial court[3], "as a matter of law . . . is insufficient to prevent the *D'Oench* doctrine's application." Appendix. I, p. 37 The court made its determination without even addressing the second prong of the *D'Oench* test, *i.e.* whether Noel participated in any short of scheme to defraud the lender. The court simply rolled forward to a virtually predetermined affirmance of the summary judgment.

In granting summary judgment, the Circuit Court ignored the traditional standard under Rule 56, F.R.C.P., *i.e.* that summary judgment should not be granted when there are genuine issues of material fact. To reach its result, the court had to expand the common law by grafting the specific recording and filing requirements of § 1823(e) onto the *D'Oench* doctrine.

This Court has restricted the application and development of federal common law in cases involving the FDIC. In *Atherton*, the Court made this restriction plain:

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[3]The documents included a written partnership agreement between Noel and the bank's subsidiary, documents showing that Western Gulf closed Mile High in 1985, documents evidencing the in substance foreclosure, official minutes of the Association which show the project was listed as "real estate owned," and the reference in the minutes to the Board's admission that Noel may have claims against the association. See Appendix I, pgs. 34-37.

> This Court has recently discussed what one might call "federal common law" in the strictest sense, *i.e.* a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial "creation of a special federal rule of decision. See, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-643, 101 S.Ct. 2061, 2066-2068, 68 L.Ed.2d 500 (1981) The Court has said that "cases in which judicial creation of a special federal rule would be justified . . . are . . . "few and restricted.." *O'Melveny & Myers v. FDIC*, 512 U.C. 79, 87, 114 S.CT.2048, 2055, 129 L.Ed.2d 67 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.CT. 1441, 1445, 10 L.E.d.2d 605(1963)). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal court. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.CT. 1301, 1304, 16 L.Ed.2d 369 (1966). Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for "'Congress acts . . . against the background of the total *corpus juris* of the states.'" *Id.*, at 68, 86 S.CT. at 1304 (quoting H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953)). Thus normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown."

Atherton, __ U.S. at ___, 117 S.Ct. at 670. The Court then went on to state that when "FDIC is acting only as a receiver of a failed institution, . . . it is not pursuing the interest of the Federal

Government as a bank insurer. . . . In sum, we can find no significant conflict with, or threat to, a federal interest." *Id.*, at 673.

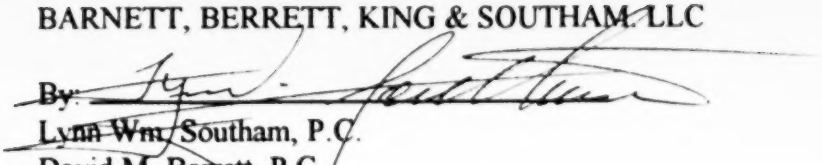
In its rush to affirm the summary judgment, the Tenth Circuit transgressed the very limitations this Court placed on the expansion of the federal common law. The Tenth Circuit set forth no analysis of why it should expand the *D'Oench Duhme* doctrine, engrafting the statutory filing requirements of 12 U.S.C. § 1823(e) into the common law, and making the failure of such requirements into a strict liability defense, rather than an equitable one. It simply made this expansion. The Tenth Circuit's decision to expand the common law is directly in conflict with the well settled rule set forth by this Court. This Petition should be granted for the purpose of reviewing and correcting this impermissible expansion of the federal common law.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and agree to review the decision of the Tenth Circuit Court of Appeals.

Dated this ____ day of October, 1999

BARNETT, BERRETT, KING & SOUTHAM, LLC

By: 

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APPENDIX I

177 F.3d 911(10th Cir. 1999)

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Western Gulf Savings and Loan Association, a Texas savings and loan association, Plaintiff-Counter-Defendant-Appellee,

v.

Wallace R. NOEL, Defendant-Counter-Claimant-Appellant.

No. 98-1021.

United States Court of Appeals,

Tenth Circuit.

May 14, 1999.

Resolution Trust Corporation (RTC), as receiver for savings and loan association, brought action against notemaker for breach of promissory note, deceit, and other claims arising out of failed real estate transaction. Notemaker asserted counterclaims for breach of fiduciary duty, accounting and dissolution of partnership, and punitive damages. Following remand, Federal Deposit Insurance Corporation (FDIC), as RTC's successor, moved for summary judgment. The United States District Court for the District of Colorado, Lewis T. Babcock, J., granted motion as to promissory note claim, and subsequently entered jury verdict for FDIC on remaining claims. Notemaker appealed. The Court of Appeals, Tacha, Circuit Judge, held that: (1) notemaker failed to preserve for

appeal issue of whether *D'Oench* doctrine applied to FDIC in its receivership capacity; (2) extension to FDIC, as receiver, of statutory restrictions on enforcement of agreements against FDIC's interests in failed financial institution's assets did not apply retroactively; (3) common-law *D'Oench* doctrine applied to preclude notemaker's counterclaim for breach of fiduciary duty; and (4) notemaker failed to show that federal regulators instigated or condoned association's alleged breaches of limited partnership agreement, under alter ego theory, so as to preclude application of common-law *D'Oench* doctrine to breach of fiduciary duty claim.

Affirmed.

Before TACHA, HENRY, and MURPHY, Circuit Judges.

TACHA, Circuit Judge.

The Resolution Trust Corporation ("RTC"), as receiver for Western Gulf Savings and Loan Association, brought this action against Wallace R. Noel for breach of a promissory note, deceit, and other claims arising out of a failed real estate transaction. Noel asserted numerous defenses and counterclaims against the RTC. The Federal Deposit Insurance Corporation ("FDIC") statutorily succeeded the RTC and moved for summary judgment, arguing that the *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676,

86 L.Ed. 956 (1942), doctrine barred defendant's affirmative defenses and counterclaims. The district court granted its motion, holding that Noel breached the promissory note as a matter of law. The FDIC's claims for deceit and other tort causes of action were tried to a jury. The jury found in favor of the FDIC, and the court entered final judgment in accordance with the jury verdict and rejected defendant's motion for new trial or judgment as a matter of law. Defendant appeals from these orders. We affirm.

I. Background

In 1982, Noel bought a piece of undeveloped property near the Colorado State University campus in Fort Collins, Colorado, which he sought to develop. Soon after purchasing the land, Noel met Ray Pogue, who presented himself as a developer with contacts at several institutions that could arrange financing for the development of Noel's land. Noel entered into an agreement to form University Courts Partnership Ltd. ("University Courts"), a limited partnership consisting of Mile High Mortgage and Investment Company of Colorado, Inc. ("Mile High"), Noel, and others. Mile High, the general partner, owned a 50*nterest, Noel, a limited partner, owned 25%, and various other limited partners cumulatively owned 25%. Western Gulf Service Corporation ("WGSC") owned 51% of Mile High, while Pogue owned the other 49%. WGSC was a subsidiary of Western Gulf Savings and Loan Association ("Western Gulf").*

In 1983, Pogue and Noel applied for a $2.5 million construction loan from Western Gulf. Pogue sent Western Gulf Noel's financial statement, showing a net worth in excess of $5 million, asking that Western Gulf "add this 'strength' to the documents [it] had on University Courts." Appellant's App., Vol. II, tab A3. The loan closed on May 25, 1983. Mile High, through its executive vice-president Pogue, signed the note for University Courts as its general partner. Noel signed the note both as a limited partner of University Courts and in his individual capacity. At the closing, Pogue and Noel entered into an written agreement in which Pogue agreed to indemnify Noel for any liability Noel might incur on the note. Western Gulf, however, never released Noel from liability on the note. Shortly after the closing, University Courts paid Noel $610,000 out of the loan proceeds for his land.

Although payable to Mile High, Mile High immediately assigned the note to Western Gulf. In October 1983, WGSC bought Pogue's 49% share in Mile High. Mile High thus became a wholly-owned subsidiary of Western Gulf.

When the promissory note became due on May 25, 1984, Western Gulf extended the note, over Noel's objection, until November 25, 1984, and again to May 25, 1985. According to the terms of the note, Western Gulf did not need Noel's permission to extend the payment date. University Courts did not pay the note,

and it went into default. By mid-1985, Western Gulf took control of the property. It also ceased the operations of WGSC and Mile *914 High. In March 1990, Western Gulf foreclosed on the property. It bid $863,655.90 at the foreclosure sale, leaving a deficiency of $2,552,799.13 on the note. On November 8, 1990, the RTC was appointed receiver of Western Gulf, and it filed this lawsuit against Noel on November 21, 1990. Thus began this lawsuit's lengthy sojourn through the court system.

RTC's original complaint alleged one claim based on the promissory note, and another claim for unjust enrichment based on the fact that Noel received the benefit of a $2.5 million loan without repaying it. Noel filed an answer, asserting several affirmative defenses, including his right to set-off or recoupment, and five counterclaims. The RTC amended its complaint on July 27, 1992, adding four claims based on false representation, non-disclosure and concealment, civil conspiracy to commit false representation, and civil conspiracy to commit nondisclosure and concealment. (FN1) The RTC premised these new allegations on Noel's deposition testimony in which he stated that when he signed the note, he did not intend to ever make payments.

Noel filed a motion to dismiss, arguing that the statute of limitations barred the fraud claims, the unjust enrichment claims were unfounded, and RTC's claim against him based on the

promissory note was subject to set-off because he was entitled to indemnification from Western Gulf, which he claimed acted as the alter ego of Mile High. The district court granted summary judgment in favor of Noel. In an unpublished order and judgment, we affirmed the district court's dismissal of the RTC's unjust enrichment claims, but reversed the district court's grant of summary judgment on the RTC's fraud claims and Noel's claims based on the alter ego doctrine, holding that genuine issues of material fact precluded summary judgment. *See Resolution Trust Corp. v. Noel*, No. 94-1195, 1995 WL 490293, at *4 (10th Cir. Aug.16, 1995). We also noted that the district court order contained no mention of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). *See id.*

On remand, the FDIC, RTC's statutory successor, filed a motion for summary judgment, asserting that the *D'Oench* doctrine and 12 U.S.C. § 1823 barred Noel's counterclaims and affirmative defenses. The common law *D'Oench* doctrine and its statutory codification, 12 U.S.C. § 1823, prohibit claims based on agreements not reflected in the official records of a failed bank or savings and loan institution. Noel responded that his counterclaims and affirmative defenses met the requirements of *D'Oench*. On June 17, 1996, the district court granted summary judgment in favor of the FDIC on its promissory note claim. It held that Noel could not use the alter ego doctrine against the FDIC because the FDIC was not

culpable for Western Gulf's behavior and no inequity would result from it recovering. It further held that *D'Oench* and 12 U.S.C. § 1823(e) barred his counterclaims and defenses, despite Noel's argument that a bank regulator would have been on notice that Noel had legal claims against Western Gulf, because none of the documents proffered by Noel met the § 1823(e) requirements.

Noel moved for reconsideration, which the district court denied on April 25, 1997. The court, on motion by Noel, clarified its summary judgment order, noting that Noel's motion for clarification was, "in essence, a thinly veiled third motion for reconsideration of [its] June 17, 1996, order." Dist. Ct. Order at 3 (May 13, 1997). It stated that it had granted the FDIC's motion for summary judgment on Noel's counterclaims for breach of fiduciary duty and accounting and dissolution of partnership. It also dismissed Noel's counterclaim ***915** for punitive damages, (FN2) leaving for trial the FDIC's claims for fraud and conspiracy.

The FDIC's remaining claims proceeded to trial, and the jury returned a verdict in favor of the FDIC for $2,552,779.13. The court entered judgment in accordance with the jury verdict. Noel subsequently moved for judgment as a matter of law, for new trial, and to alter or amend the judgment. Noel again argued that the district court erred in granting summary judgment on the FDIC's promissory note claim and attendant dismissal of Noel's defenses

and counterclaims. He argued, in part, as he did in his motion for reconsideration of the summary judgment order, that the court ignored evidence of the FDIC's involvement with Western Gulf in acts that form the basis for his claims predicated on the alter ego doctrine. Noel also asserted that the district court erroneously applied § 1823(e) retroactively. In his reply brief to this motion, Noel, for the first time, argued that *D'Oench* does not apply to the FDIC in its receivership capacity. The court denied Noel's motion.

Noel timely filed his notice of appeal. He argues on appeal that the district court erred when it applied § 1823(e) to this case. He further argues that the common law *D'Oench* doctrine does not apply to the FDIC in its receivership capacity. In his reply brief on appeal, he asserts that if the *D'Oench* doctrine does apply, his alter ego/breach of fiduciary duty counterclaim meets its requirements.

II. Waiver

[1] [2] "[A] federal appellate court [will] not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Consequently, when a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review. *See Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722-23 (10th Cir.1993) (recognizing

that an "untimely motion ... is not sufficient to preserve an issue for appellate review," and not addressing on appeal an issue that defendant raised for the first time below in a post-trial motion); *Melton v. City of Oklahoma City*, 879 F.2d 706, 718 n. 15 (10th Cir.1989) (finding issue that party did not properly raise before district court until Motion for Judgment N.O.V. was not properly preserved for appeal); *Burnette v. Dresser Indus., Inc.*, 849 F.2d 1277, 1285 (10th Cir.1988) (declining to address arguments on appeal not considered below because litigant first raised them in a motion for reconsideration). In this case, Noel failed to timely present the issue of whether the *D'Oench* doctrine applies to the FDIC as receiver to the district court. Noel did not argue that the *D'Oench* doctrine does not apply to the FDIC when it acts in its receivership capacity until his reply brief in support of a motion for new trial, judgment as a matter of law, and to alter or amend judgment. He filed this motion after completion of the trial and nearly seventeen months after the district court entered summary judgment pursuant to the *D'Oench* doctrine. Moreover, Noel did not even raise this issue in his initial brief in support of his post-trial motion; he waited until his *reply* brief. The district court, not surprisingly, did not address the merits of this issue in its one-page order denying Noel's motion. *See* Dist. Ct. Order (Dec. 19, 1997).

Noel argues that despite his tardiness in raising it below, we should not preclude this argument because it stems from two

opinions, *Atherton v. FDIC*, 519 U.S. 213, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997), and *Ledo Fin. Corp. v. Summers*, 122 F.3d 825 (9th Cir.1997), issued after the court's ruling on summary judgment. In *Ledo*, the ***916** Ninth Circuit, relying on the principles enunciated in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83-85, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) and *Atherton*, 117 S.Ct. at 673, concluded that "no unique federal interest exists to justify application of federal common law." *Ledo*, 122 F.3d at 829. Thus, it held that the common law *D'Oench* doctrine does not apply to the FDIC as receiver. *See id.* Noel argues that we should follow the reasoning of the Ninth Circuit.

Although new law often justifies an untimely motion, this exception does not apply in this case. Even assuming, without deciding, that *Atherton* changed the legal landscape in applying the common law *D'Oench* doctrine and even if we were to accept the Ninth Circuit reasoning, Noel could have raised these arguments in the district court prior to June 1996. Related arguments regarding the vitality of *D'Oench* as it applies to the FDIC in its receivership capacity have been argued since *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). *See Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 83 F.3d 1317, 1327, 1329-30 (11th Cir.1996) (en banc), *vacated by Hess v. FDIC*, 519 U.S. 1087, 117 S.Ct. 760, 136 L.Ed.2d 708 (1997); *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank of*

Kansas City, 69 F.3d 1398, 1401-03 (8th Cir.1995); *Murphy v. FDIC*, 61 F.3d 34, 38-40 (D.C.Cir.1995). Indeed, the Ninth Circuit in *Ledo* explicitly relied, in part, on *O'Melveny & Myers*. *See Ledo*, 122 F.3d at 828-29. The Supreme Court issued *O'Melveny & Myers* on June 13, 1994, two years prior to the district court's grant of summary judgment in this case. Noel has no excuse for failing to timely raise this argument.

Moreover, even if we accepted Noel's argument, he has failed to assert any reason for his failure to include this argument in his initial post-verdict motion. Both decisions upon which Noel purportedly relies were issued months before he filed his motion for new trial, judgment as a matter of law, and to alter or amend judgment. In choosing not to assert this argument until his reply, Noel precluded a response by the FDIC and prevented reasoned consideration by the district court. Therefore, we hold that Noel has waived the argument that the *D'Oench* common law doctrine does not apply to the FDIC as receiver.

III. 12 U.S.C. § 1823(e) and *D'Oench*

[3] Noel argues that the district court erred in granting FDIC's motion for summary judgment by retroactively applying 12 U.S.C. § 1823(e) and rejecting his argument that the *D'Oench* doctrine does not bar his defenses and counterclaims because they arise from

documents contained in the records of Western Gulf. We review de novo the district court's grant of summary judgment, construing the factual record and the reasonable inferences drawn from it in the light most favorable to the nonmoving party. *See, e.g., Kaul v. Stephan,* 83 F.3d 1208, 1212 (10th Cir.1996). In deciding the appropriateness of summary judgment, "[w]e are not limited to the grounds upon which the trial court relied but may base summary judgment on any proper grounds found in the record to permit conclusions of law." *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.,* 131 F.3d 874, 882 (10th Cir.1997) (internal quotation marks and citation omitted). Thus, we "affirm the district court's decision to grant summary judgment if the record contains any basis to do so." *Morgan v. Hilti, Inc.,* 108 F.3d 1319, 1321 (10th Cir.1997) (quoting *Jones v. Unisys Corp.,* 54 F.3d 624, 628 (10th Cir.1995)).

[4] Noel contends that the district court erred by retroactively applying the requirements of 12 U.S.C. § 1823(e) to this case. We agree. Prior to the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") amendments in 1989, § 1823(e) applied only to the FDIC in its corporate capacity. We have *917 previously held that "the 1989 statute's extension to the FDIC as receiver of section 1823(e)'s provisions ... does not apply retroactively." *Oklahoma Radio Assocs. v. FDIC,* 987 F.2d 685, 690 (10th Cir.1993). Because the conduct of the parties and the

agreements at issue here took place prior to 1989, the district court erred in applying § 1823(e) to this case. Nevertheless, we may affirm the district court's grant of summary judgment if § 1823(e)'s common law counterpart, the *D'Oench* doctrine, bars defendant's claim. (FN3)

[5] On appeal, Noel argues that Western Gulf, as an alter ego of Mile High, breached the fiduciary duties articulated in University Court's partnership agreement. (FN4) He asserts that the records of Western Gulf contained the partnership agreement and other documents sufficient to preclude the *D'Oench* doctrine from barring his breach of fiduciary duty claim. He also argues that the FDIC cannot assert the *D'Oench* doctrine because Western Gulf was acting under an operating agreement with RTC when Western Gulf breached the partnership agreement.

[6] The federal common law *D'Oench* doctrine, first set forth by the Supreme Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), "prohibits claims based upon agreements which are not properly reflected in the official books or records of a failed bank or thrift." *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir.) (internal quotation marks omitted), *cert denied*, --- U.S. ----, 118 S.Ct. 329, 139 L.Ed.2d 255 (1997). In *D'Oench*, the FDIC sued the maker of a demand note payable to Bellville Bank and Trust Company, a failed institution. The maker

defended against the claim by presenting receipts for the notes which indicated an agreement between the maker and bank that the bank would not call the notes for repayment. In concluding that the maker could not raise a "secret" agreement with the bank to defend against the FDIC's suit, the Court recognized a "federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [it] insures or to which it makes loans." *D'Oench*, 315 U.S. at 457. Therefore, the Supreme Court stated:

> The test [for the doctrine's applicability] is whether the note was designed to deceive the creditors or the public authority[,] or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.

D'Oench, 315 U.S. at 460; *accord Oklahoma Radio Assocs.*, 987 F.2d at 691.

Since 1942, federal courts have expanded the common law doctrine beyond the ***918** narrow facts of *D'Oench*, applying it, for example, to the FDIC as receiver and to other federal banking agencies. (FN5) *See, e.g., Castleglen, Inc. v. Resolution Trust Corp.*, 984 F.2d 1571, 1576 (10th Cir.1993); *Motorcity of*

Jacksonville, Ltd. v. Southeast Bank, 83 F.3d 1317, 1325 (11th Cir.1996) (en banc) (citing cases), *vacated by Hess v. FDIC*, 519 U.S. 1087, 117 S.Ct. 760, 136 L.Ed.2d 708 (1997). While the purpose underlying the *D'Oench* doctrine, to "permit regulators to accurately appraise the assets of savings institutions by allowing the regulators to rely on the assets' face value," *Castleglen*, 984 F.2d at 1577, has remained constant during its evolution, "its focus has shifted from the fraudulent, illegal, or secret character of the debtor's acts to the effect the acts have on the regulatory agency's ability to evaluate quickly and accurately a savings institution's assets," *id.* at 1576. Bank examiners must often conduct these evaluations and decide the course of the bank's fate overnight. *See Langley v. FDIC*, 484 U.S. 86, 91-92, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987). The design of the *D'Oench* doctrine thus "favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can." *Bell & Murphy & Assocs. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754 (5th Cir.1990); *see also Motorcity*, 83 F.3d at 1325.

Given the overarching purposes behind the doctrine, courts have consistently held that inferences that an examiner could feasibly draw from a failed institution's written records are insufficient to preclude the operation of *D'Oench*. *See Resolution Trust Corp. v. Allen*, 16 F.3d 568, 575 (4th Cir.1994)

("Enforcement of agreements which must be inferred from written recorded agreements is forbidden under D'Oench Duhme; *explicit* written documentation is required." (emphasis added)); *Community Bank of the Ozarks v. FDIC*, 984 F.2d 254, 257 (8th Cir.1993) ("Neither section 1823(e) nor D'Oench is satisfied by inferences drawn from a bank's records."); *Clay v. FDIC*, 934 F.2d 69, 72 (5th Cir.1991) (asserting that "where bank documents only raise an 'inference' of a secret agreement, such an inference is insufficient to support a judgment where the FDIC is one of the parties involved in the bank transfer"). Indeed, this circuit has indicated that suggestive evidence arising from the bank's written records is insufficient to bar the operation of *D'Oench*. *See Castleglen*, 984 F.2d at 1578-79. In short, the FDIC has no duty to scour a failed institution's documents for inferences and hidden duties supporting defenses or counterclaims that might prevent the FDIC from collecting the full value of an otherwise facially valid instrument.

[7] In this case, Noel contends that the written records of Western Gulf contain information upon which he bases his alter ego/breach of fiduciary duty claim. In order for Noel to prevail, we must find a genuine issue of material fact as to whether the records would indicate to a bank examiner that Western Gulf had duties and liabilities arising out of the University Courts' partnership agreement. In his response to FDIC's renewed motion for summary judgment, Noel argued that documents from the permanent loan file

show that Western Gulf (1) closed Mile High in 1985; (2) took over the property through in substance foreclosure; (3) did not maintain Mile High's corporate existence; (4) *919 listed the University Court's property in the Board of Directors' minutes and books as real estate owned; and (5) had been advised in an official meeting that Noel may have claims against it. He asserts, "Each of these points may well satisfy the requirements of *D'Oench*. Each was sufficient to put the regulators on notice of Noel's claims. The totality of the records is sufficient to prevent summary judgment." Appellant's Reply Br. at 15.

However, the logical deductions which a bank examiner would have had to make to conclude that the FDIC could not recover the full value of Noel's facially valid note due to his alter ego/breach of fiduciary duty claim are far from straightforward. The bank examiner would, at a minimum, have to determine that Western Gulf acted as an alter ego to Mile High and therefore had continuing duties stemming from the University Courts' partnership agreement. The written documentation to which Noel points to advance such a determination is scattered throughout various letters, ledgers, minutes, and other records. In fact, nowhere in the record can we find one written agreement indicating any possibility of Western Gulf's liability under the partnership agreement. The agreement itself does not reference Western Gulf, and Noel points to no

document which clearly shows that Western Gulf, through Mile High, had a continuing involvement in University Courts.

The documents to which Noel refers, at best, make only scattered references to University Courts. The "Real Estate Owned" lists and summaries prepared monthly as part of Western Gulf's financial statements indicate that Western Gulf owned University Courts. Other records show the status of the loan to Mile High and Noel. The Board of Directors' minutes from November 13, 1986, indicate that Mile High was inactive, but not dissolved. Minutes from December 15, 1988, indicate that Mile High existed at that time but that it would automatically dissolve at the end of the year if Colorado tax returns were not filed. The minutes also state:

> Mr. Noel is a 50% partner [in University Courts], however we have not heard anything from him in years. Mr. White stated that apparently foreclosure has not occured [sic] previously due to concern that Mr. Noel could have legal causes of action against [University Courts]. Mr. White went on to state that he was of the opinion that Western Gulf should automatically let Mile High Mortgage dissolve, then Western Gulf could start foreclosure proceedings.

Appellant's App., Vol. II, tab E4. However, none of these records clearly suggest that Mile High was actually dissolved or that Western Gulf acted as an alter ego to Mile High or had an obligation under the University Courts' partnership agreement. Furthermore, we have carefully reviewed the other documents in the record, and find that none would sufficiently put the FDIC on notice that Noel

had a breach of fiduciary duty claim against Western Gulf because it acted as an alter ego to Mile High. In any event, the FDIC simply had no duty to ferret out and piece together, from vague, scattered references of various unrelated writings, the information necessary to draw such conclusions. Indeed, even when the documents were neatly presented to us in the record, we had difficulty piecing together a legal theory suggesting that Western Gulf could not recover the full value of Noel's facially valid note because he was entitled to a set-off. Placing an affirmative duty on bank regulators to engage in a similarly tortured analysis runs counter to the purpose of the *D'Oench* doctrine--to allow examiners to accurately and quickly appraise a bank's assets. Therefore, we hold, as a matter of law, that this scattered evidence is insufficient to prevent the *D'Oench* doctrine's application. *See Allen,* 16 F.3d at 575; *Clay,* 934 F.2d at 72-73.

[8] Finally, Noel asserts that the *D'Oench* doctrine does not bar his alter ego/breach of fiduciary duty claim because ***920** federal regulators instigated, or at least condoned, Western Gulf's breaches of the partnership agreement. The Federal Savings and Loan Insurance Corporation ("FSLIC") entered into an operating agreement with Western Gulf in February 1985. Shortly after entering the operating agreement, Western Gulf classified the University Court's property as real estate it owned, and it ceased the operations of Mile High, the general partner to University Courts.

Noel deduces, "In other words, it appears that the action which constituted a breach of the general partner's duties was taken at the direction of the federal regulatory authority." Supplemental Submission in Opposition to Plaintiff's Renewed Motion for Summary Judgment, at 2. He further argues that an October 8, 1986 letter from Western Gulf to the Federal Home Loan Bank of Dallas shows that Western Gulf acted according to a federal regulator's instructions. That letter touted, as a cost-saving measure, the closure of "the Western Gulf Service Corporation loan origination office in Denver." Appellant's Supp.App. tab 5. Noel claims this obviously references Mile High as it was the only office maintained by Western Gulf in Denver. Finally, at a board meeting during the time Western Gulf operated under the agreement with FSLIC, the board discussed Mile High. The board decided that despite Mile High's present inactivity, it might have a future need for the corporation. Noel acknowledges the board conducted no discussion regarding Mile High's status as the general partner of University Courts or the fiduciary obligations it may have owed Noel.

[9] Noel thus argues that because Western Gulf entered into an operating agreement with FSLIC and the actions giving rise to Noel's claims occurred while the operating agreement was in effect, we can infer that Western Gulf acted at the behest of federal regulators in allegedly breaching the partnership agreement between Mile High and Noel. Under this theory, summary judgment is

inappropriate because "[i]t would be manifestly unjust to allow FDIC to invoke *D'Oench* to shield itself from the actions of its predecessors in interest." Supplemental Submission in Opposition to Plaintiff's Renewed Motion for Summary Judgment, at 5.

The language of the operating agreement, however, refutes Noel's implication that federal regulators instigated or condoned Western Gulf's alleged breaches of fiduciary duty. It states, "Nothing in this paragraph shall require the Association to breach or abrogate any legally binding written contractual commitments outstanding on or before the effective date of this Agreement." Appellant's Supp.App. tab 5. Noel relies solely on the fact that Western Gulf had entered into this operating agreement with FSLIC to show FSLIC complicity in the alleged breaches. We refuse to impute Western Gulf's actions to FSLIC when the language of its agreement with Western Gulf explicitly states that Western Gulf should not breach any agreements in an effort to comply with the regulations. Moreover, we cannot impute to FSLIC any responsibility for the closure of Mile High. The cited letter does not obviously reference Mile High. It refers only to a loan origination office in Denver. This is insufficient to put FSLIC on notice that the reference pertained to Mile High. Finally, even though the Western Gulf's board discussed the inactivity of Mile High at a meeting during the period it acted under the FSLIC operating agreement, the board did not mention that it had any continuing liability under the

University Courts' partnership agreement. Therefore, even assuming that the FDIC could not assert the *D'Oench* doctrine if it were instrumentally involved in the actions of the financial institution, we find no evidence here that the FDIC instructed Western Gulf to breach any fiduciary duties that may have been owed to Noel. Hence, Noel's final argument also fails.

***921.** Accordingly, we AFFIRM the district court's grant of summary judgment.

FN1. The amended complaint also contained a new claim for breach of the covenant of good faith and fair dealing. This claim was later dismissed when the RTC confessed Noel's motion to dismiss that particular claim.

FN2. Noel had previously withdrawn his other two counterclaims for fraud and fraud in the inducement.

FN3. In his opening brief, Noel states that "if the common law permutation of 1823(e), that is, *D'Oench Duhme* applies to Noel's claims, then Noel is not entitled to relief herein." Appellant's Br. at 15. Although we could appropriately consider the argument regarding whether Noel can meet the requirements of *D'Oench* waived for not arguing, indeed conceding, it in his opening brief, *see State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n. 7 (10th

Cir.1994), we reach the merits of his argument. Noel vigorously argued to the district court that his defenses and counterclaims met the requirements of *D'Oench*. He further asserted this argument in his reply brief, characterizing his opening brief concession as error. Given the particular circumstances of this case, including the thorough examination of the argument by the FDIC contained in the record, we do not deem this argument waived.

FN4. To the extent that Noel may have desired us to consider affirmative defenses and counterclaims beyond the alter ego/breach of fiduciary duty claim, we decline to do so. Noel did not argue in his opening brief, nor his reply brief, that he could meet the requirements of the common law *D'Oench* doctrine with respect to additional counterclaims and other defenses originally raised in his answer. Thus, he has waived those issues on appeal. *See, e.g., Mhoon,* 31 F.3d at 984 n. 7 (finding waiver when defendant fails to raise issue in opening brief).

FN5. We recognize that several courts, relying on FIRREA's enactment and/or the Supreme Court's opinions in *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), and *Atherton v. FDIC,* 519 U.S. 213, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997), have found that the *D'Oench* common law doctrine no longer applies to the FDIC in its receivership capacity. *See Ledo Fin. Corp. v. Summers,* 122 F.3d 825 (9th Cir.1997); *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First*

Nat'l Bank of Kansas City, 69 F.3d 1398 (8th Cir.1995); *Murphy v. FDIC*, 61 F.3d 34 (D.C.Cir.1995). Because Noel waived this argument, we do not address the issue and assume for the purposes of this case only the applicability of the common law *D'Oench* doctrine.

APPENDIX II

64 F.3d 670

RESOLUTION TRUST CORPORATION, as Receiver for Western Gulf Savings and Loan Association, a Texas Savings and Loan association, Plaintiff-Appellant,

v.

Wallace R. NOEL, Defendant-Appellee.

No. 94-1195.

United States Court of Appeals, Tenth Circuit.

Aug. 16, 1995.

ORDER AND JUDGMENT (FN1)

Before TACHA, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and BURRAGE, District Judge. (FN2)

PER CURIAM.

On November 8, 1990, the Resolution Trust Corporation (RTC) was appointed receiver for the Western Gulf Savings & Loan Association (Western Gulf), whose principal place of business was in Bay City, Texas. On November 21, 1990, RTC brought the present action in the United States District Court for the District of

Colorado against Wallace R. Noel (Noel) for payment of the balance due on a promissory note given for a loan for the development of a condominium project, consisting of approximately 100 units, in Fort Collins, Colorado. The defendant, Noel, owned the land on which the condominiums were to be built. The entity which was to be used to build the condominiums was University Courts Partnership Ltd. (University Courts), a partnership consisting of Mile High Mortgage and Investment Company of Colorado, Inc. (Mile High), the general partner with a 50% interest, and Noel as a limited partner with a 25% interest, and other limited partners also with a 25% interest. Mile High, a Colorado corporation, was owned by Western Gulf Service Corporation (WGSC) with a 51% interest and by one Roy Pogue who had a 49% interest. WGSC was a subsidiary of Western Gulf.

University Courts borrowed $2,500,000 from Western Gulf. (FN3) Mile High, through its executive vice-president Pogue, signed the note for University Courts as its general partner. Noel also signed the note as a limited partner and individually. Pogue and Noel at the same time entered into an indemnity agreement whereby Pogue agreed to indemnify Noel for any liability Noel might incur resulting from his signing the note. The loan closed on May 25, 1983, and shortly thereafter University Courts paid Noel $610,000 out of the loan proceeds for his land on which the condominiums were to be built. The note was payable to Mile High, but was

immediately assigned to Western Gulf. In October, 1983, WGSC bought out Pogue's interest in Mile High.

When the promissory note became due on May 25, 1984, University Courts requested an extension of the due date of the note. Over Noel's objection, Western Gulf extended the due date on the note to November 25, 1984, and there was a second extension to May 25, 1985. The note was not paid by May 25, 1985, and went into default, and Western Gulf took control of the property on which the condominiums had been built. In March, 1990, Western Gulf foreclosed on the properties here involved and bid $863,655.90 at the foreclosure sale, leaving a deficiency of $2,552,799.13.

In its original complaint filed on November 21, 1990, RTC asserted two claims for relief: one claim based on the promissory note, and a second claim for unjust enrichment based on the fact that Noel received the benefit of the $2,500,000 loan which had never been repaid. Noel filed an answer to the complaint and asserted several affirmative defenses, including his right to set-off or recoupment.

RTC filed an amended complaint on July 27, 1992, which, in addition to the claims on the note and for unjust enrichment, included four claims based on false representation, non-disclosure and concealment, civil conspiracy to commit false representation and civil conspiracy to commit non-dislosure and concealment. These

additional claims were based on statements made by Noel when deposed in July, 1992, to the effect that when he signed the note in question on May 25, 1983, he did not, in fact, intend to ever make any payment thereon. (FN4)

In this setting, Noel filed a motion to dismiss or, in the alternative, for summary judgment. The basis for the motion was that the four fraud related claims were barred by a three-year statute of limitations, that the claim for unjust enrichment was unfounded, and that RTC's claim against Noel based on the promissory note was subject to set-off because Noel was entitled to indemnification from Mile High which Noel claimed was the alter ego of Western Gulf.

***670_** After hearing, the district court on March 8, 1993, denied the motion to dismiss or, in the alternative, for summary judgment. In so doing, the district court held that question of just when Western Gulf knew, or reasonably should have known, of the alleged fraud of Noel in signing the note without any intent to repay could not be resolved on motion for summary judgment.

As concerns RTC's claim based on the promissory note, the district court held that "this claim cannot be decided on a motion for summary judgment."

The district court also denied the motion for summary judgment on RTC's claim based on unjust enrichment. As to that particular claim, the district court focused on the fact that immediately after the loan Noel sold land which had been appraised at $580,000 to University Courts for $610,000.

On November 12, 1993, Noel filed a second motion for summary judgment, asserting that as a result of "recent depositions, facts have come to light which demonstrate the plaintiff's assertions in opposition to first motion, assertions which formed the basis for ... the Court's Memorandum Opinion [of March 8, 1993], are without merit" and that Noel was entitled to summery judgment on all claims.

On March 8, 1994, the district court held a hearing on Noel's second motion for summary judgment, which consisted of colloquy between court and counsel, at the conclusion of which the court took the matter under advisement. On March 22, 1994, the district court in a Memorandum Opinion and Order granted the motion for summary judgment and dismissed all of RTC's claims. As concerns RTC's several fraud claims, the district court held that all were barred by Colorado's three-year statute of limitations, C.R.S. 13-80-101(1)(2). In thus holding, the district court found that Western Gulf either knew, or by the exercise of reasonable diligence should have known, by "mid-1985" that Noel when he signed the note did not intend to ever make payment thereon.

As concerns RTC's claim on the promissory note, the district court found that Mile High was the alter ego of Western Gulf (FN5) and that Noel, as a guarantor of the note, was not liable to Western Gulf and therefore had "no liability to RTC's receiver for Western Gulf on the note."

In finding Mile High to be the alter ego of Western Gulf, the district court noted the ten factors to be considered in determining whether to pierce the corporate veil as set forth in *Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1262-63 (10th Cir.1989), and found seven of those ten factors to be present in the instant case and sufficient to pierce the corporate veil and find one to be the alter ego of the other. In such circumstance, the district court concluded that Noel was no more liable on the note to Western Gulf than he was to Mile High, and that in any event any possible liability on the note would be offset by the right of recourse he had against Mile High, and therefore recourse he had against Western Gulf. Finally, on this claim, the district court recognized that to prevail under the alter ego doctrine, Noel also had to prove that the corporate entity was used to defeat public convenience, or to justify or protect wrong, fraud or crime, again citing *Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc.*, 878 F.2d at 1264-65. In this connection, the district court stated that RTC, "by pursuing Noel, is using the corporate entities to 'protect wrong.' "

As concerns RTC's unjust enrichment claim, the district court found that by selling his land, which had an appraised value of $580,000, to University Courts for $610,000, Noel was not unjustly enriched since he used the $30,000 differential, or most of it, "to pay off interest that had accrued on the loan by which he acquired the land."

On appeal, RTC argues that the district court erred in granting summary judgment for Noel on its several fraud claims and on its claim based on the promissory note. RTC does not argue on appeal that the district court erred in entering summary judgment in favor of Noel on its claim based on unjust enrichment. Accordingly, that part of the district court's judgment dismissing RTC's claim of unjust enrichment is affirmed. However, that part of the district court's judgment granting Noel summary judgment on RTC's claims based on fraud and on the promissory note and dismissing those claims is reversed.

This Court reviews a grant of summary judgment *de novo*, applying the same standard as the district court. *Cone v. Longmont United Hospital Assn.*, 14 F.3d 526, 527 (10th Cir.1994). Summary judgment is appropriate if there "is no general issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celatex Corp. v. Calrett*, 477 U.S. 317, 322-23 (1986). This Court views the evidence and draws any inferences in the light most favorable to the party opposing

summary judgment. *MacDonald v. Eastern Wyoming Mental Health Center,* 941 F.2d 1115, 1117 (10th Cir.1991). The opposing party, however, must identify sufficient evidence to require submission of the case to the jury. *MacDonald,* 941 F.2d at 1121-22.

***670_** As indicated, the district court initially denied Noel's motion for summary judgment on RTC's claims based on fraud and on the promissory note with the observation that such claims simply could not be resolved by summary judgment and presented fact issues that should be resolved at trial. Later, on a second motion for summary judgment, the district court determined that summary judgment was proper on both the fraud claims and the claim based on the promissory note.

Our study of the record before the district court when it granted Noel's second motion for summary judgment leads us to conclude that the district court erred and that the claims based on fraud and the note cannot be resolved by summary judgment.

As to the fraud claims, the district court assumed fraud, but concluded that each was time-barred by a three-year statute of limitations. It should be remembered that the core of the fraud claims was that when Noel signed the note on May 25, 1983, he, at that time, had no intent to ever pay anything on the note. In this regard, the district court found that Western Gulf either knew, or

should have known, by "mid-1985" that Noel *never* intended to make any payment on the note. RTC's position on this matter is that it really didn't know that on May 25, 1983, Noel didn't intend to repay the note until Noel was deposed in July, 1992, during the course of the present litigation, and that by the exercise of reasonable diligence Western Gulf could not have discovered the fraudulent intent before 1989, when certain documents were turned over to Western Gulf by Noel, and that such was within the three-year statute. All things considered, the date when Western Gulf knew, or should have known, that on May 25, 1983, Noel had no intention of ever paying anything on the note cannot be resolved on summary judgment.

Similarly, the ten factors to be considered in determining whether the corporate veil should be pierced and whether Mile High was the alter ego of Western Gulf presents, in our view, a fact question which, on the record before the district court, could not be resolved by summary judgment. The question of whether Mile High really is the alter ego of Western Gulf should first be properly decided before addressing the legal consequences thereof.

Another matter deserves some comment. In connection with Noel's claims for indemnity from Mile High based on the alter ego theory, RTC argues in this Court that under *D'Oench, Dahone & Co. v. FDIC*, 315 U.S. 447 (1942), and its progeny, the RTC and FDIC are not subject to claims or defenses which are based on

transactions tending to mislead examiners or unrecorded agreements which are not properly reflected in the official books and records of a failed thrift or bank. In Noel's brief, counsel argues that all agreements relied on by Noel are fully documented in the official books and records of Western Gulf. We are uncertain whether this particular matter was addressed in the district court. We do know, however, that in its Memorandum Opinion and Order of March 22, 1994, there is *no* mention of *D'Oench.*

The judgment dismissing RTC's claim based on unjust enrichment is affirmed. The judgment dismissing the fraud claims and the claim based on the note is reversed and the case is remanded for further proceedings.

FN1. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata,* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

FN2. Honorable Michael Burrage, District Judge of the Eastern and Northern Districts of Oklahoma, sitting by designation.

FN3. On May 10, 1983, Pogue and Noel submitted a construction loan application to Western Gulf.

FN4. The amended complaint also contained a new claim for breach of the covenant of good faith and fair dealings, which claim was later dismissed when RTC confessed Noel's motion to dismiss that particular claim.

FN5. Specifically, the district court held it was "proper to treat Western Gulf and Mile High as the same entity for the purposes of resolving Noel's liability in this action."

APPENDIX III

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Case No. 98-1021

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Western Gulf Savings and Loan Association, a Texas savings and loan association,

Plaintiff/Counter-Defendant/Appellee,

v.

WALLACE R. NOEL,

Defendant/Counter-Claimant/Appellant.

ORDER

Filed July 14, 1999

Before **TACHA, HENRY,** and **MURPHY,** Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: Audrey F. Weigel (signed)

Deputy Clerk